ANDREW LEE SIEW LING A

v.

UNITED OVERSEAS BANK (MALAYSIA) BHD

FEDERAL COURT, PUTRAJAYA B
ZULKEFLI MAKINUDIN CJ (MALAYA)
ABDULL HAMID EMBONG FCJ
AHMAD MAAROP FCJ
ZALEHA ZAHARI FCJ
SULONG MATJERAIE FCJ C
[CIVIL APPEAL NO: 02( )-79-12-2011(J)]
27 NOVEMBER 2012

BANKING: *Banks and banking business - Loan agreement - Principal borrower defaulted in settling loan amount - Claim against guarantor for* D
interest on outstanding loan amount - Bankruptcy Act 1967, s. 8(2A) - Correct interpretation of - Whether acts as statutory clamp on secured creditors prohibiting them from claiming further interest - Whether merely limits secured creditor's right to continue to impose interest on amount outstanding vis a vis the bankrupt or wound up debtor - Whether applies E
to a guarantor giving indemnity - Whether guarantor 'debtor' envisaged in s. 8(1) Bankruptcy Act 1967 - Interpretation Acts 1948 & 1967, s. 17A

BANKING: *Guarantee and indemnity - Loan agreement - Principal* F
debtor defaulted in settling loan amount - Claim against guarantor for interest on outstanding loan amount - Bankruptcy Act 1967, s. 8(2A) - Correct interpretation of - Whether acts as statutory clamp on secured creditors prohibiting them from claiming further interest - Whether merely limits secured creditor's right to continue to impose interest on amount G
outstanding vis a vis the bankrupt or wound up debtor - Whether applies to a guarantor giving indemnity - Whether guarantor 'debtor' envisaged in s. 8(1) Bankruptcy Act 1967 - Interpretation Acts 1948 & 1967, s. 17A

STATUTORY INTERPRETATION: *Interpretation of Acts - Intention of legislature - Bankruptcy Act 1967, s. 8(2A) - Correct* H
interpretation of - Whether acts as statutory clamp on secured creditors prohibiting them from claiming further interest - Whether merely limits secured creditor's right to continue to impose interest on amount outstanding vis a vis the bankrupt or wound up debtor - Whether applies I

to a guarantor giving indemnity - Whether guarantor 'debtor' envisaged in s. 8(1) Bankruptcy Act 1967 - Interpretation Acts 1948 & 1967, s. 17A

The respondent, a licensed bank, granted a term loan ("the loan") to a company known as Monzo (M) Sdn Bhd ("Monzo"). The loan was secured by a charge over two pieces of land, along with a letter of guarantee and indemnity executed by the appellant and one Mok Hwee Huan, who was subsequently adjudged a bankrupt. Monza defaulted in payment and was subsequently wound up by a separate action in the Kuala Lumpur High Court. The respondent then commenced this suit against the appellant and obtained the order for sale of the charged lands. Subsequently, the respondent applied for summary judgment against the appellant. The appellant contested the respondent's application only with regard to the amount due to the respondent. The High Court entered judgment in favour of the respondent in the sum of RM1,022,134.75, the amount due as at the winding up order of Monzo and ordered each party to bear their own costs. It was held by the High Court Judge that s. 8(2A) of the Bankruptcy Act 1967 ('the Act') acts as a statutory clamp on secured creditors prohibiting them from claiming any further interest on the debt after the winding up of a company if the secured creditors fail to realise their security within the period of six months as mandated by that subsection. Dissatisfied with the decision of the High Court, the respondent appealed to the Court of Appeal. The Court of Appeal allowed the respondent's appeal with costs and held that the interpretation of s. 8(2A) of the Act was that it merely limits the secured creditor's right to continue to impose interest on the amount outstanding to him *vis-a-vis* the bankrupt or wound up debtor and the property of that debtor. Aggrieved by the decision of the Court of Appeal, the appellant appealed to the Federal Court. The question of law that arose was whether a secured creditor in law could claim interest, *inter alia*, from a guarantor/person whose liability was pursuant to a guarantee/indemnity/third party chargor, after the date of winding up of a borrower company or the receiving order if it did not realise its security within six months of the winding up order or receiving order made against the borrower, as a consequence of s. 8(2A) of the Bankruptcy Act 1967 read together with s. 4(1) of the Civil Law Act 1956.

Held (dismissing the appeal with costs)
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) Section 8(2A) of the Act does not apply to the appellant who is a guarantor cum person giving indemnity as it only applies when a secured creditor is realising its security against the bankrupt debtor. The appellant was not the "debtor" envisaged in s. 8(1) of the Act. In this regard, there was no receiving order made against the appellant. As such, s. 8(2) was not applicable to the appellant, and it followed too that the exception to that section *ie*, s. 8(2A), would also not be applicable to him. (paras 12, 13 & 15)

(2) The intent and purpose of s. 8(2A) of the Act is to clamp interest claimable by the secured creditor against the bankrupt debtor so as to afford protection to the unsecured creditors of the bankrupt debtor and the bankrupt debtor himself. This is to ensure that the level of debt would not increase, and the share that each unsecured creditor has on the assets of the debtor would not be diminished. (para 16)

(3) The Court of Appeal in the present case had applied the provisions of s. 17A of the Interpretation Acts 1948 and 1967 ("Interpretation Act") in its interpretation of s. 8(2A) of the Act in coming to its decision in allowing the respondent's appeal. The plain meaning of s. 8(2A) makes it necessary for this court to answer the question posed in the affirmative. Further, even where the plain meaning of s. 8(2A) of the Act was in doubt, the broad purpose of the Act could only result in an affirmative answer to the question before this court. (para 19)

(4) Section 8(2A) of the Act in the way interpreted by the respondent would advance the purpose of the Act and did no violence to the plain meaning of both the Act and the said s. 8(2A). The appellant's interpretation of that section, however, would not advance the purpose of the Act. It was not the intention of Parliament in enacting s. 8(2A) of the Act to affect the interest of the secured creditor *vis-a-vis* any guarantor or indemnifier. (para 20)

A **(5)** The appellant's liability, being a person who has given a guarantee and more importantly an indemnity, was primarily separate and independent from any other person. The appellant was primarily liable for losses which the principal borrower could not have been made liable. His liability was
B not dependent or secondary to the liability of the principal borrower. He was a principal debtor himself. The liability under a contract of indemnity does not depend on whether the principal debt was enforceable. It has no reference in law to the obligation of any third person. In essence, the liability
C of the person who has given an indemnity can be more extensive than that of the liability of the principal borrower. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

D Responden, sebuah bank berlesen, telah memberi pinjaman berkala ('pinjaman') kepada sebuah syarikat yang dikenali sebagai Monzo (M) Sdn Bhd ("Monzo"). Pinjaman itu telah dijamin oleh gadaian dua keping tanah, termasuk surat gerenti dan tanggungrugi yang
E dimeterai oleh perayu dan satu Mok Hwee Huan, yang telah menjadi bankrap selepas itu. Monza telah ingkar dalam bayaran dan seterusnya telah digulung di dalam satu tindakan berasingan di Mahkamah Tinggi Kuala Lumpur. Responden telah memulakan guaman ini terhadap perayu dan memperolehi perintah jualan
F tanah-tanah yang digadai itu. Seterusnya, responden telah memohon penghakiman terus terhadap perayu. Perayu mencabar permohonan responden hanya berkenaan dengan amaun yang didakwa masih terhutang kepada responden. Mahkamah Tinggi telah memasukkan penghakiman berpihak kepada responden dalam
G amaun RM1,022,134.75, amaun yang terhutang pada perintah penggulungan Monzo dan memerintah setiap pihak menanggung kos mereka sendiri. Ia telah diputuskan oleh Hakim Mahkamah Tinggi bahawa s. 8(2A) Akta Kebankrapan 1967 ('Akta') bertindak sebagai penghalang statutori pemiutang bercagar yang melarang
H mereka daripada menuntut faedah lanjutan terhadap sesuatu hutang selepas penggulungan sebuah syarikat jika pemiutang bercagar gagal memanfaatkan sekuritinya dalam masa enam bulan seperti yang diperuntukkan oleh subseksyen tersebut. Tidak puas hati dengan keputusan Mahkamah Tinggi, responden merayu ke
I Mahkamah Rayuan. Mahkamah Rayuan telah membenarkan permohonan responden dengan kos dan memutuskan bahawa

tafsiran s. 8(2A) Akta adalah ianya sekadar membataskan hak pemiutang bercagar untuk terus mengenakan faedah bagi amaun tertunggak *vis-a-vis* si bankrap atau penghutang yang digulung dan hartanya. Terkilan dengan keputusan Mahkamah Rayuan, perayu merayu ke Mahkamah Persekutuan. Persoalan undang-undang yang timbul adalah sama ada pemiutang bercagar dari segi undang-undang boleh menuntut faedah, antara lain, daripada penjamin/seseorang yang liabilitinya menurut jaminan/tanggungrugi/penggadai pihak ketiga, selepas tarikh penggulungan syarikat yang meminjam atau perintah penerimaan jika ia gagal memanfaatkan sekuritinya dalam masa enam bulan perintah penggulungan atau perintah penerimaan yang dibuat terhadap peminjam, akibat daripada s. 8(2A) Akta Kebankrapan 1967 dibaca bersama dengan s. 4(1) Akta Undang-Undang Sivil 1956.

Diputuskan (menolak rayuan dengan kos)
Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Seksyen 8(2A) Akta tidak boleh digunapakai pada perayu yang merupakan penjamin merangkap seseorang yang memberi tanggungrugi kerana ia hanya boleh digunapakai apabila pemiutang bercagar memanfaatkan sekuritinya terhadap penghutang bankrap. Perayu bukan "penghutang" seperti yang dibayangkan di bawah s. 8(1) Akta. Dalam hal ini, tiada perintah penerimaan dibuat terhadap perayu. Oleh itu, s. 8(2) tidak digunapakai pada perayu, diikuti juga bahawa pengecualian pada seksyen itu iaitu s. 8(2A), juga tidak digunapakai pada perayu.

(2) Tujuan dan niat s. 8(2A) Akta adalah untuk menghalang faedah yang boleh dituntut oleh pemiutang bercagar terhadap penghutang bankrap supaya ia boleh memberi perlindungan kepada pemiutang tidak bercagar penghutang bankrap dan penghutang bankrap sendiri.Ini adalah untuk memastikan tahap hutang tidak akan meningkat, dan bahagian kepunyaan setiap pemiutang bercagar ke atas aset-aset penghutang tidak akan berkurangan.

(3) Mahkamah Rayuan di dalam kes ini telah menggunapakai peruntukan-peruntukan s. 17A Akta Tafsiran 1948 dan 1967 ("Akta Tafsiran") dalam penafsiran s. 8(2A) Akta apabila membuat keputusan membenarkan rayuan responden. Maksud

jelas s. 8(2A) menjadikan ia perlu bagi mahkamah ini menjawab persoalan yang ditimbulkan secara afirmatif. Seterusnya, walaupun maksud jelas s. 8(2A) Akta adalah dalam keraguan, tujuan luas Akta hanya boleh mengakibatkan jawapan afirmatif kepada persoalan di hadapan mahkamah ini.

(4) Cara s. 8(2A) Akta ditafsirkan oleh responden akan memajukan Akta dan tidak akan melakukan kekacauan kepada maksud jelas kedua-dua Akta dan s. 8(2A) tersebut. Tafsiran perayu mengenai seksyen itu, walau bagaimanapun, tidak akan memajukan tujuan Akta. Ia bukan niat Parlimen dalam penggubalan s. 8(2A) Akta untuk menjejaskan kepentingan pemiutang bercagar *vis-a-vis* seseorang penjamin atau penanggungrugi.

(5) Liabiliti perayu, sebagai seorang yang telah memberi satu jaminan dan lebih penting lagi satu tanggungrugi, adalah terutamanya berasingan dan bebas daripada pihak-pihak lain. Perayu adalah terutamanya bertanggungjawab bagi kerugian-kerugian yang peminjam utama tidak mungkin bertanggungjawab. Liabiliti perayu tidak bergantung atau sekunder pada tanggungjawab peminjam utama. Perayu juga adalah penghutang utama. Liabiliti di bawah kontrak tanggungrugi tidak bergantung pada sama ada hutang utama dikuatkuasakan. Ia tidak mempunyai rujukan dalam undang-undang pada mana-mana kewajipan pihak ketiga. Pada asasnya, liabiliti seseorang yang telah memberi tanggungrugi boleh menjadi lebih luas berbanding dengan liabiliti peminjam utama.

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

Chung Khiaw Bank Ltd v. Soi Huan & Ors [1985] 1 LNS 71 HC ***(refd)***

Yeoman Credit Ltd v. Latter & Anor [1961] 2 All ER 294 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 8(1), (2), 8(2A)

Civil Law Act 1956, s. 4(1)

Interpretation Acts 1948 & 1967, s. 17A

For the appellants - Bastian Vendargon (PK Nathan, T Gunaseelan, Ng Chew Hor & Gene Vendargon with him); M/s PK Nathan & Co

For the respondent - Ng Sai Yeang (Lim Siew Ming & Loke Yuen Hong with him); M/s Raja Daryl & Loh

[Appeal from Court of Appeal; Civil Appeal No: J-02(IM)-2768-2009]

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal in allowing the respondent's appeal against the decision of the High Court entering judgment in favour of the respondent in the sum of RM1,022,134.75 being the amount due as at the date of the winding up order of a company known as Monzo (M) Sdn Bhd ("Monzo").

Background Facts

[2] The relevant background facts of this case may be summarized as follows:

(i) The respondent, a licensed bank, granted a term loan of RM1,000,000 ("the loan") to Monzo at the interest rate of 1.75% per annum in addition to the respondent's prevailing Base Lending Rate.

(ii) The loan was secured by a charge over two pieces of land situated in the Mukim of Plentong, District of Johor Bahru. The loan was also secured by a Letter of Guarantee and Indemnity executed by the appellant and one Mok Hwee Huan.

(iii) Monzo defaulted in payment and it was subsequently wound up by a separate action in the Kuala Lumpur High Court on 19 June 2002.

(iv) The respondent then commenced this suit against the appellant and Mok Hwee Huan. However, Mok Hwee Huan was adjudged bankrupt in Singapore on 25 October 2002. The respondent obtained the order for sale of the charged lands on 25 July 2006.

(v) The respondent applied for summary judgment against the appellant. The appellant contested the respondent's application only with regard to the amount due to the respondent.

A (iv) Among the issues before the High Court is whether the respondent can, in law, claim interest after 19 June 2002, that is the date of winding-up order of Monzo, by virtue of s. 8(2A) of the Bankruptcy Act 1967 ("the Act") read together with s. 4(1) of the Civil Law Act 1956. The
B evidence shows that the amount due to the respondent as at 19 June 2002 is RM1,022,134.75.

Findings Of The High Court

[3] On 21 October 2009, the learned High Court Judge entered
C judgment in favour of the respondent in the sum of RM1,022,134.75, the amount due as at the winding-up order of Monzo and ordered each party to bear their own costs. The learned High Court Judge held that sub-s. 8(2A) of the Act acts as a statutory clamp on secured creditors prohibiting them from
D claiming any further interest on the debt after the winding up of a company if the secured creditors fail to realize their security within the period of six months as mandated by that subsection. The prohibition attaches to the debt so as to prohibit the secured creditors from claiming interest beyond that period, not only from
E the borrower, but also from the guarantors.

Findings Of The Court Of Appeal

[4] Dissatisfied with the decision of the High Court, the
F respondent appealed to the Court of Appeal. On 14 July 2011, the Court of Appeal allowed the respondent's appeal with costs and held that the interpretation of sub-s. 8(2A) of the Act is that it merely limits the secured creditor's right to continue to impose interest on the amount outstanding to him *vis-a-vis* the bankrupt
G or wound up debtor and the property of that debtor.

Leave To Appeal To The Federal Court

[5] Aggrieved by the decision of the Court of Appeal, the appellant sought for leave to appeal to the Federal Court. On
H 5 December 2011, the Federal Court granted the appellant leave to appeal on the following question of law:

> Can a secured creditor in law, claim interest, *inter alia*, from a guarantor, and/or person whose liability is pursuant to a guarantee and/or indemnity, and/or a third party chargor, after the date of
I winding up of a Borrower Company or the Receiving Order if it does not realize its security within six months of the winding up order or Receiving Order made against the Borrower, as a consequence of section 8(2A) of the Bankruptcy Act 1967 read together with section 4(1) of the Civil Law Act 1956?

Decision

[6] The only issue for the determination of this court based on the factual circumstances of the present case is on the correct interpretation to be given to the provision of s. 8(2A) of the Act which reads as follows:

> Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

[7] In the context of the present case and in relation to the position of a wound-up company, the provision of s. 8(2A) of the Act has to be read together with s. 4(1) of the Civil Law Act 1956 which provides as follows:

> In the administration by any court of the assets of any deceased person whose estate proves to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under any law from time to time in force relating to companies, whose assets prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up, the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as are in force for the time being, under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt.

[8] Learned counsel for the appellant amongst others submitted before us that the appellant as a guarantor had only guaranteed the amount legally and statutorily due to the respondent from the principal debtor in respect of the debt. It is the contention of the appellant that the appellant's liability as a guarantor to the respondent cannot be more than what the principal debtor (the borrower) is statutorily liable for. If this is not the purpose and intent for which s. 8(2A) of the Act was passed by Parliament then all guarantors will be left at the mercy of lenders and chargees who can take their own sweet time or drag their feet to realize their security.

[9] Learned counsel for the appellant also submitted that the Court of Appeal ought to have dealt with the question of whether the respondent can contract out of the provision of s. 8(2A) of

A the Act. There is nothing in s. 8(2A) of the Act to allow parties to contract out of this provision. It is the contention of the appellant that the Court of Appeal erred in law in applying the terms of the Letter of Guarantee and Indemnity executed between the appellant and the respondent to defeat the limiting provisions
B enacted under s. 8(2A) of the Act.

[10] It was further submitted for the appellant that the Court of Appeal had imported words into s. 8(2A) of the Act in its interpretation of the said section, and by doing so, had excluded
C its effect in relation to guarantors when there is nothing in s. 8(2A) itself to exclude its applicability to guarantors. On this point learned counsel for the appellant contended that the Court of Appeal failed to take into consideration s. 17A of the Interpretation Acts 1948 and 1967 which provides for a purposive
D approach in the interpretation of statutes. According to the appellant's counsel the interpretation of s. 8(2A) given by the Court of Appeal would lead to an unjust result as the guarantor becomes liable for a larger debt than that of the borrower who took the benefit of the loan.

E **[11]** With respect to the above contention of the appellant we find no merits in the argument made before us. We are in agreement with the interpretation given by the Court of Appeal that s. 8(2A) of the Act does not apply to the appellant who is a
F guarantor cum person giving indemnity for the following reasons:

[12] It is our considered view that s. 8(2A) of the Act applies only when a secured creditor is realizing its security against the bankrupt debtor. Section 8(2A) must be read in the context of and together with sub-ss. (1) and (2) of s. 8 of the Act. For
G completeness the whole provision of s. 8 of the Act is reproduced as follows:

> 8. (1) On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property
H of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms
I as the court may impose.

(2) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed – nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of section 31 of the Employment Act 1955 (Act 265) of the States of Peninsular Malaysia or any corresponding provisions in Sabah and Sarawak.

(2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

(3) On a receiving order being made against a debtor he shall, within twenty-four hours after such order has been served upon him file an affidavit in the office of the Director General of Insolvency, containing a true and correct statement of the names and residences of all the partners, if any, in his business and of his principal assets and liabilities. Such statement shall for the purposes of this Act be deemed to be part of the debtor's statement of his affairs referred to in section 16.

(4) On such order as aforesaid being made against a debtor the Director General of Insolvency shall forthwith take possession of all books of account and other papers and documents in the possession, custody or control of the debtor relating to his property or affairs, and may take into his possession all or any deeds, books, documents and other property of the debtor.

[13] Section 8(2A) of the Act comes under the purview of s. 8 of the Act entitled "Effect of receiving order". It is an exception to s. 8(2) of the Act. As an exception to s. 8(2), s. 8(2A) provides a limitation as to the entitlement of interest by a secured creditor. It states that the secured creditor shall not be entitled to any interest in respect of his debt after the making of the receiving order, if he does not realize his security within six months from the date of the order.

[14] It must be noted that s. 8 of the Act deals with the property or person of the debtor against whom a receiving order has been made. Section 8(2) and s. 8(2A) of the Act deals with what the secured creditor can and cannot do in respect of realizing or otherwise dealing with his security where the debtor is concerned. Nothing in these two sections suggests that they govern the properties or persons of parties against whom no receiving order is made.

A **[15]** It is our finding that the appellant is not the "debtor" envisaged in s. 8(1) of the Act. In this regard, there is no receiving order made against the appellant. As such, s. 8(2) does not apply to him. Thus, if s. 8(2) is not applicable to the appellant, it follows too that the exception to that section, ie, s. 8(2A), will also not B be applicable to him.

[16] We are further of the view that the appellant's liability, being a person giving the indemnity is primarily separate and independent from any other person. He can be made liable for C losses which the principal borrower (Monzo) could not have been made liable. The intent and purpose of s. 8(2A) of the Act is to clamp interest claimable by the secured creditor against the bankrupt debtor so as to afford protection to the unsecured creditors of the bankrupt debtor and the bankrupt debtor himself. D This is to ensure that the level of debt would not increase, and the share that each unsecured creditor has on the assets of the debtor would not be diminished.

[17] We do not agree with the submission of learned counsel for E the appellant that the Court of Appeal failed to address its mind to the wisdom of the statutory provision as contained in s. 17A of the Interpretation Acts 1948 and 1967 ("Interpretation Act") which provides for a purposive approach in the interpretation of statutes. It was contended for the appellant that such an F interpretation as given by the Court of Appeal would lead to an unjust result in that the guarantor becomes liable for a larger debt than that of the borrowers who had the use and benefit of the loan.

[18] Section 17A of the Interpretation Act provides that: G

> A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object.

H On the proper application of the provision of the said section 17A of the Interpretation Act we would refer to the case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195 wherein this court had laid down the principles *inter alia* as follows:

I

> In summarizing the principles governing the application of the purposive approach to interpretation, **Craies** on ***Legislation*** (8th edn.) says at page 566:

(1) *Legislation is always to be understood first in accordance with its plain meaning.* A

(2) *Where the plain meaning is in doubt, the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.*

B

(3) *Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.*

(4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language. C

(5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation. D

E

The choice prescribed in section 17A of '... a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object ...' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and unambiguous section 17A will have no application as the question of another meaning will not arise. *Thus, it is only when a provision is capable of bearing two or more different meanings can section 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation. The principles set out in the preceding paragraphs will therefore be relevant to the operation of section 17A.* (emphasis added) F G

[19] In accordance with the principles laid down in the above case of *All Malayan Estates Staff Union (supra)*, it is noted that the Court of Appeal in the present case had in fact applied the provisions of s. 17A of the Interpretation Act in its interpretation of s. 8(2A) of the Act in coming to its decision in allowing the respondent's appeal. This is so because the plain meaning of s. 8(2A) makes it necessary for this court to answer the question posed in the affirmative. Further, even where the plain meaning of H I

A s. 8(2A) of the Act is in doubt the broad purpose of the Act can only result in an affirmative answer to the question before this court.

[20] We are of the view that a reading of s. 8(2A) of the Act in
B the way interpreted by the respondent would advance the purpose of the Act and does no violence to the plain meaning of both the Act and the said s. 8(2A). Conversely, the appellant's interpretation of that section would not advance the purpose of the Act and s. 8(2A). We agree with the views expressed by the
C Court of Appeal in the present case that it was not the intention of Parliament in enacting sub-s. 8(2A) of the Act to affect the interest of the secured creditor *vis-à-vis* any guarantor or indemnifier.

D **[21]** On the issue of whether the respondent can contract out of the provision of s. 8(2A) of the Act by using the terms of the Letter of Guarantee and Indemnity executed between the appellant and the respondent to defeat the limiting provisions enacted under s. 8(2A) of the Act as raised by the appellant, we are of the view this is a non issue and should not arise at all.
E

[22] It is our finding that the Letter of Guarantee and Indemnity contained several clauses which clearly show the intention of both guarantors to undertake the liability for the repayment of the term loan and interest therein not merely as sureties but also as a
F principal debtors as well as indemnifiers. The relevant cls. 9, 17 and 21 of the Letter of Guarantee and Indemnity are reproduced as follows:

> Clause 9
>
> G Though as between us and the customer we are sureties only for the customer, yet as between you and us we shall be deemed to be principal debtors for all the monies the payment of which is hereby guaranteed and accordingly we shall not be discharged nor shall our liability be affected in any way by any fact circumstance
> H act omission or means whatsoever whether known to you or not whereby our liability hereunder would have been discharged if we had not been principal debtors.
>
> Clause 17
>
> I As a separate and independent stipulation we hereby agree that in the event the monies hereby guaranteed may not be recoverable on the footing of a guarantee, whether by reason of any legal

limitation, disability or incapacity on the part of the customer or any other fact or circumstance, and whether known to you or us or not, shall nevertheless be recoverable from us as sole or principal debtor in respect of it and shall be paid by us on demand.

Clause 21

For the consideration aforesaid and as a separate and independent stipulation in addition to and not in derogation of the guarantee herein given we hereby irrevocably and unconditionally undertake to indemnify you and keep you indemnified fully and completely against all claims and demands actions and proceedings losses damages costs and expenses including legal costs as between a solicitor and client and all other liabilities of whatsoever nature or description which may be made taken incurred or suffered by you in connection with or in any manner arising out of the facilities.

[23] It is our considered view that in the present case the appellant, being a person who has given a guarantee and more importantly an indemnity, is primarily liable for losses which the principal borrower could not have been made liable. His liability is not dependent or secondary to the liability of the principal borrower. He is a principal debtor himself. The liability under a contract of indemnity does not depend on whether the principal debt is enforceable. It has no reference in law to the obligation of any third person. In essence, the liability of the person who has given an indemnity can be more extensive than that of the liability of the principal borrower. (See the cases of (1) *Yeoman Credit Ltd v. Latter & Anor* [1961] 2 All ER 294 and (2) *Chung Khiaw Bank Ltd v. Soi Huan & Ors* [1985] 1 LNS 71].

Conclusion

[24] For the reasons abovestated we would answer the question posed in the affirmative. In the result the appeal is dismissed with costs. We award costs of RM15,000 to the respondent. The deposit to be paid to the respondent towards costs.